UNITED STATES
v.
GARY C. FICHTNER ET AL.

IBLA 76-182 Decided March 3, 1976

Appeal from decision (OR-10140) by Administrative Law Judge E. Kendall Clarke declaring Dakota Boy No. 3 placer mining claim null and void.

Affirmed.

1. Mining Claims: Discovery: Generally

Evidence of mineralization which may justify further exploration, but not development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

2. Mining Claims: Hearings -- Rules of Practice: Evidence

Evidence tendered on appeal from an adverse decision in a mining claim contest cannot be considered except for the limited purpose of deciding whether a further hearing is warranted.

APPEARANCES: Gary C. Fichtner, pro se; Lawrence E. Cox, Esq., Assistant Regional Solicitor, Department of the Interior, Portland, Oregon, for appellee-contestant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Gary C. Fichtner 1/ appeals from the decision dated August 12, 1975, by Administrative Law Judge E. Kendall Clarke which declared

1/ The original contest complaint, dated March 30, 1973, listed as contestees George Yarbrough, Elberta L. Bosch, Harry C. Bosch, Terry Hildebrand and Sandra Lee Hildebrand. On May 9, 1973, the Oregon State Office, Bureau of Land Management, received a

the Dakota Boy No. 3 placer mining claim null and void. The mining claim is located in section 23, T. 40 S., R. 8 W., W.M., Josephine County, Oregon.

The mining contest (OR-10140) was initiated by complaint dated March 30, 1973. The original complaint, and the subsequent amended version, charged that "minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery." Following appellant's answer to the amended contest complaint, a hearing was held in Medford, Oregon, on March 12, 1975.

At the hearing, the Government's sole witness, Fred S. Boyd, Jr., a mining engineer employed by the Bureau of Land Management (BLM), testified that he examined the claim in 1972 and removed two samples which, later testing showed, contained gold valued at approximately 3-1/2 cents per cubic yard (Tr. 7-13). He further stated that in his opinion a man of ordinary prudence "would not have a reasonable prospect of developing a paying mine" (Tr. 13-14).

Appellant presented no evidence concerning any recent mining activities on the claim. He did introduce a 1959 assay report indicating the presence of gold in the assayed sample, but he was unable to establish where on the claim the sample was taken (Tr. 18-20, 22). Appellant testified that he purchased the claim in January 1973 (Tr. 17). Concerning his own mining activities, he stated that he has not found anything (Tr. 20). He expressed the opinion that the fact he had not found anything did not mean there was not something to be found (Tr. 20-21).

In his decision, Judge Clarke determined that the Government had presented an unrebutted prima facie case that there had not been a valid discovery on the mining claim. He then held the mining claim to be null and void.

Appellant now challenges the validity of the BLM mining engineer's findings. He alleges that he has found gold in greater quantity on the claim than the mining engineer did. He argues that he should be given more time "to find the gold I know is there." In support of his position, he submits a statement from a previous owner of the mining claim.

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fn. 1 (continued)
letter from Mr. and Mrs. Gary Fichtner stating that they were the current owners of the mining claim. On May 29, 1973, an amended contest complaint was issued and listed the original contestees plus Gary C. Fichtner and Kathy Fichtner. At the hearing, Gary C. Fichtner was the only contestee to appear although his wife had signed their answer to the contest complaint.

In its answer to appellant's appeal, the Government argues that appellant has failed to affirmatively show error in Judge Clarke's decision. The Government further argues that the decision below was correct in any event and that a further hearing is not warranted.

[1] The Government is correct in its argument that appellant has failed to show error in the decision below. The mere expectation of finding valuable mineral deposit on a mining claim is insufficient to establish a discovery. The Board stated in United States v. Gondolfo, 9 IBLA 204 (1973):

> Evidence of mineralization which may justify further exploration in hope of finding a valuable mineral deposit is not synonymous with evidence of mineralization which will justify the expenditure of labor and money with a reasonable prospect of success in developing a valuable mine. Only the latter constitutes discovery. [Citations omitted.]

Id. at 207; United States v. MacIver, 20 IBLA 352, 356-58 (1975); United States v. Swanson, 14 IBLA 158, 165, 81 I.D. 14, 17 (1974), suit pending, Civ. No. 4-74-10 (D. Idaho).

At the hearing, appellant introduced no evidence of exploratory or mining activities on the claim. 2/ The assay reports he submitted were over 15 years old and were not specifically identified with any part of the mining claim. Both at the hearing and on appeal appellant has stated that if he is allowed to continue exploration, he will find gold. This does not constitute a valid discovery.

[2] Evidence tendered on appeal after an adverse decision at a hearing cannot be considered except for the limited purpose of deciding whether a further hearing is warranted. The evidence itself must have probative value and must be accompanied by a justification for the failure to introduce the evidence at the hearing. United States v. MacIver, supra at 358-59. Appellant's allegation that he has discovered gold in greater quantity than the BLM mining engineer is not accompanied by supporting reports or information. Appellant did submit a statement by Harry C. Bosch, a previous owner of the mining claim. However, that statement, while suggesting that the testing methods of the BLM mining engineer might be inadequate, generally described the vagaries of the mining business. Mr. Bosch gave no indication that he or anyone else had ever approached making a valid discovery on the mining claim. This is not a sufficient showing to warrant a new hearing. 3/

2/ There are a cabin and other improvements on the claim which are unrelated to any mining activities.
3/ Although the contest complaint is silent on this point, it appears that the land was "withdrawn from all forms of appropriation under the mining laws" as of October 2, 1968, by

Moreover, appellant had from June 13, 1973, the date of his answer to the complaint, until March 12, 1975, the date of the hearing, to conduct tests on his mining claim. He does not explain his failure to do so. In the absence of a compelling reason to the contrary, we will not order a new hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge E. Kendall Clarke declaring Dakota Boy No. 3 placer mining claim null and void is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

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fn. 3 (continued)
section 9 of the Wild and Scenic Rivers Act, 16 U.S.C. § 1280 (1970). This withdrawal applies to all land within one quarter mile of the bank of the Illinois River, Oregon, and is effective for a minimum period of 10 years. 16 U.S.C. § 1276(a)(9) (1970); 16 U.S.C. § 1278(b) (Supp. IV, 1974). The fact of the withdrawal was brought out at the hearing and in Judge Clarke's decision. Appellant contends the land has not yet been included as a wild and scenic river but admits it is under study. Regardless of appellant's assertion, the land has been withdrawn. Where land is withdrawn, the validity of a mining claim must be established as of the date of the withdrawal. United States v. Rigg, 16 IBLA 385, 394 (1974); United States v. Henry, 10 IBLA 195, 199-200 (1973). Assuming appellant had been able to submit proof of a valuable mineral discovery, the proof would have to establish such a discovery as of October 2, 1968, the date of the withdrawal by Congress. However, the fact that appellant was unable to show a discovery at the time of the hearing makes it unnecessary to consider this point. United States v. Rigg, supra at 394.